SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 346

STONEWALL COTTON MILLS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

W. H. Watkins,
P. H. Eager, Jr.,
J. A. Covington,
Edwin L. Snow,
Gabe Jacobson,
Counsel for Petitioner.

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STONEWALL COTTON MILLS, INC.,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May it please the Court:

The petition of the Stonewall Cotton Mills, Inc., hereinafter referred to as the petitioner, shows unto the Court:

A.

Summary Statement of Matter Involved.

The petitioner was the owner and operator, at the time of the origin of the controversies involved herein, of a cotton mill at Stonewall, Mississippi, an unincorporated village containing about 2,000 people.

On May 22nd, 1940, the National Labor Relations Board, acting through its regional director, filed a complaint against the petitioner, based upon charges made by the

Textile Workers Federal Local Union No. 31723, affiliated with the American Federation of Labor. The complaint charged that the petitioner was guilty of, and was then guilty of, certain unfair labor practices affecting commerce within the meaning of the National Labor Relations Act (R. 25, with reference to transcript). The complaint charged that the petitioner refused to bargain collectively and negotiate with the representatives of the Union respecting wages, hours, and other conditions; that it interfered with, restrained and coerced its employees in violation of the act; that the petitioner discharged and refused to reinstate five employees because of Union activity, thereby discriminating against and discouraging Union membership among its employees; that the petitioner warned its employees against voting for or joining the Union, prevented them from joining the Union or brought about their withdrawal, thereby interfering with and coercing its employees within the meaning of the act.

Issue was taken upon the complaint by petitioner (R. 33). A trial examiner was appointed, who, after conducting hearings, filed a report, October 18, 1940 (R. 66). The examiner found that the petitioner had not been guilty of any unfair labor practices as to J. A. Holloman and Della Todd; that it had discriminated, however, in regard to hire and tenure as to one W. A. Taylor, G. A. Holloman and Hill Logan, and reported that petitioner had refused to bargain collectively with the Union. That it had interfered with and coerced its employees. The petitioner filed exceptions to the examiner's report before the Board (R. 148). The Board upon the 17th day of October, 1941 (R. 162) announced the following conclusions:

That petitioner had (1) discriminated in regard to the hire and tenure of employment of W. A. Taylor, C. A. Holloman and Hill Logan, thereby discouraging membership in the Union, constituting unfair labor practice within

the meaning of Section 8(3) of the act; (2) that the petitioner by refusing to bargain collectively with the Union was guilty of unfair labor practices within the meaning of the act; (3) that by interfering with its employees in the exercise of the rights guaranteed in Section 7 of the act, the petitioner was engaged in unfair labor practices within the meaning of Section 8(1) of the act; and (4) that petitioner was not guilty of unfair labor practices as to Mrs. Della Todd or J. A. Holloman within the meaning of the act.

The Board made an order (R. 162) requiring the petitioner to desist from:

> (a) Discouraging membership in the Union by discharging or refusing to reinstate or re-employ certain employees;
>
> (b) From refusing to bargain collectively with the representative of the Union;
>
> (c) From in any other manner interfering, restraining or coercing its employees in the exercise of the rights of sub-organization, etc.

The petitioner was required to take the following affirmative acts:

(a) To offer to reinstate W. A. Taylor, C. A. Holloman and Hill Logan, with reimbursement for loss of pay suffered by each of them.

(b) Bargain collectively with a representative of the Union as exclusive bargaining agent.

(c) Post and maintain notices to its employees of compliance with the order of the Board, and desist from interference.

Within the ten day period provided for in the order, the petitioner notified the regional director for the Fifteenth

Region at New Orleans, Louisiana, of its intention immediately to file its petition with the United States Circuit Court of Appeals, Fifth Circuit, that the Board's order be modified or set aside, which petition was duly filed.

The National Labor Relations Board appealed before the United States Circuit Court of Appeals, filed a cross-petition praying that the Board's order be inforced as rendered.

The case was briefed, argued and submitted before the United States Circuit Court of Appeals, Fifth Circuit, with the result that upon the third day of June, 1942, the Court handed down an opinion accompanied by an order affirming the Board's findings:

> (1) That there was refusal to bargain;
>
> (2) That there had been interference in violation of Section 8(1) of the act; and decreed enforcement of the Board's order in respect thereto.

That that portion of the Board's order requiring the reinstatement and reimbursement of Taylor, Holloman and Logan be not inforced but set aside (R. 226, 231).

The National Labor Relations Board filed a motion for rehearing (R. 233) and upon consideration thereof, the court modified its former order by affirming the action of the Board as to the reinstatement and reimbursement of Taylor, adhering, however, to its original opinion in all other respects.

Stating the matter in its simplest terms, the result of the opinions and judgments of the United States Circuit Court of Appeals was that:

> (1) The petitioner had restrained and coerced its employees as found by the Board and it was ordered to desist, in violation of Section 8, paragraph 1 of the National Labor Relations Act.

(2) Petitioner discriminated in regard to the hire and tenure of W. A. Taylor and Petitioner was directed to reinstate the said Taylor with compensation, in violation of Section 8, paragraph 3 of the act.

(3) Petitioner had refused to bargain collectively with the Union and it was ordered to desist therefrom, in violation of Section 8, paragraph 5 of the act. (R. 253, 255.)

There is involved in this case the correctness of the order of the Circuit Court of Appeals in respect to the foregoing matters.

B.

Jurisdiction.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13, 1925; 43 Statutes at Large 938, Sec. 347, U. S. Ann. Code, Title 28.

The decree sought to be reviewed dated upon the 1st day of August, 1942 (R. 255).

C.

Basis on Which It Is Contended That This Court Has Jurisdiction to Review the Judgment with Reasons for Allowing the Writ.

(1) The decision of the United States Circuit Court of Appeals decided that the Petitioner restrained and coerced its employees, in violation of Section 8, paragraph 1 of the act, which decision of the Court is in conflict with the applicable decisions of this Court in that the conclusion reached by said Court is not supported by substantial evidence. It is necessary that the finding of the Board, as well as the decision of the Court affirming or ordering the enforcement thereof, be supported by substantial testimony. In this case,

there is absolutely no testimony whatsoever in support of the finding or the decree of the United States Circuit Court of Appeals, Fifth Circuit. The findings of the Board in respect to the charge of interference and coercion will be found Rec. 174, and involves the telephone conversations, the expressions of President Oscar Berman, the expressions of employees, and the acts of the management concerning the election.

(a) In respect to the telephone conversation, the Board found (R. 165) that Harrington communicated with the manager, Berman at Cincinnati, Ohio, by long distance telephone. The only testimony in respect thereto is that of Brown (Tr. 592). The testimony of the witness in no manner tends to sustain the charge, and no other testimony was offered in respect thereto.

(b) Concerning the anti-Union expressions of President Oscar Berman, referred to in the Board's decision (R. 168), the only testimony in respect thereto was that of W. A. Taylor (Tr. 136), Paul Tood (Tr. 349), and Secretary Harrington (Tr. 1221, reference to typewritten testimony). There was no other testimony in respect thereto, and the evidence offered neither proved, nor tended to prove coercion on the part of the President or laborers; neither was there any testimony tending to show that the activities of the Union were affected in the slightest manner.

(c) Concerning the anti-Union expressions of Priester, the Board's decision in respect thereto is found Rec. 166. The entire evidence in respect thereto was found in the testimony of C. A. Holloman (Tr. 248), and Priester (Tr. 1095). The evidence neither established nor tended to establish coercion on the part of Priester, nor did it establish or tend to establish that the Union's activities were in any manner interfered with thereby.

(d) Concerning the anti-Union expressions of Richardson, the finding of the Board in respect thereto will be found Rec. 166. All the testimony in respect

thereto will be found in the testimony of C. A. Holloman (Tr. 249).

(e) Concerning the anti-Union expressions of Add Privett, the finding of the Board in respect thereto is found R. 167. The entire evidence in respect thereto is found in the testimony of Holloman (Tr. 42).

(f) Concerning the anti-Union expressions of Priester, the finding of the Board is found Rec. 170. All of the testimony in respect thereto will be found in the evidence of J. A. Holloman (Tr. 251), Priester (Tr. 1001), C. A. Holloman (Tr. 1585), Bevin Long (Tr. 393), Ben McPherson (Tr. 399). From this testimony, it appeared that the statements complained of were isolated statements amounting to nothing more than friendly banter between friends and acquaintances in a small community. The remarks took place casually, and there was no evidence that the remarks had the slightest effect in preventing or discouraging Union activities, or that the statements had any effect upon anybody.

(g) Concerning the notice November 11, 1939, given by the Petitioner of the approaching election, the finding of the Board in respect thereto will be found R. 171. All the testimony therein will be found: W. A. Taylor (Tr. 162), B. F. Berman (Tr. 1273), from which it necessarily appears that the notice of the approaching election given by the Petitioner was merely a helpful and unbiased explanation as to the purpose of the approaching election made upon the request of the employees themselves and amounted to nothing more than a correct statement of the actual situation without evidence of any kind of interference, pressure, or coercion. The following authorities are directly in point:

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; N. L. R. B. v. Columbian Co., 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; International Brotherhood of Electrical Workers v. N. L. R. B., 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed.

1524; Remington-Rand v. N. L. R. B., 58 S. Ct. 1046, 304 U. S. 576, 82 L. Ed. 1540, re-hearing denied, 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549.

(a) For the same reason, the decision of the Circuit Court of Appeals of the United States is in conflict with the decisions of the following other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. The Lion Shoe Co., 97 Fed. (2d) (1st Cir.) 448; Ballston-Stillwater Knitting Co. v. N. L. R. B., 98 Fed. (2d) (2 Cir.) 758; Republic Steel Corp. v. N. L. R. B., 107 Fed. (2d) (3 Cir.) 472; Martel Mills Corp. v. N. L. R. B., 114 Fed. (2d) (4 Cir.) 624; N. L. R. B. v. Gosher Rubber & Mfg. Co., 110 Fed. (2d) (6 Cir.) 432; Foote Bros. v. N. L. R. B., 114 Fed. (2d) (7 Cir.) 611; Hamilton-Brown Shoe Co. v. N. L. R. B., 104 Fed. (2d) (8 Cir.) 49; N. L. R. B. v. Grower-Shipper Assn., 122 Fed. (2d) (9 Cir.) 368.

(b) The decision of the Circuit Court of Appeals of the United States is in conflict with the decisions of other Circuit Courts of Appeal on the same matter in that the Petitioner and its agents and officers had the right to express their opinion to employees provided there is absence of interference and coercion. Friendly intercourse between the employer and employees is not prohibited by the act, and the employer has the right to express an honest opinion or state its policy and position.

Virginia Electric & Power Co. v. N. L. R. B., 115 Fed. (2d) (4 Cir.) 414; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) (6 Cir.) 800; Jefferson Electric Co. v. N. L. R. B., 102 Fed. (2d) (7 Cir.) 949; N. L. R. B. v. Union Pacific Stages, 99 Fed. (2d) (9 Cir.) 153; The Press Co., Inc. v. N. L. R. B., 118 Fed. (2d) (D. C.) 937.

(2) The decision of the United States Circuit Court of Appeals that the Petitioner discriminated in regard to the hire and tenure of W. A. Taylor is in conflict with the applicable decisions of this Court because unsupported by substantial evidence.

The Board found (R. 199) that the Petitioner discriminated against W. A. Taylor for Union activities by refusing to re-instate him and in refusing to reimburse him for lost time, thereby discouraging membership in the Union and coercing the employees in the exercise of their rights guaranteed under Section 7 of the act, in violation of paragraph 3, Section 8 thereof. The proof showed without conflict that on June 19, 1939, Bill Roberts was put in the place of Taylor as a roving hauler (Tr. 159). Other haulers were put on (Tr. 160). Taylor testified that none of the supervisors complained of his work (Tr. 165). He admitted that he had a brother, Harvey Taylor, working for the Petitioner who belonged to the Union (Tr. 182). He admitted that at the time he was discharged there was not enough work for three roving haulers; that it was a job for only two men (Tr. 189). He admitted that his daughter, Miss Donnie Taylor, and his son-in-law, E. N. Smith, worked at the mill (Tr. 218). The other testimony in respect thereto is found in the evidence of J. R. Brown (Tr. 600), A. F. Richardson (Tr. 622), Jim Barnes (Tr. 703), Dalton Clark (Tr. 737), Randolph Gilbert (Tr. 778), J. W. Downs (Tr. 811), Clarence Harper (Tr. 843), and Robert Walker (Tr. 1187). There was not even a scintilla of evidence in the record that the discharge of Taylor was brought about by reason of Union activities or had any effect upon the organization or operation of the Union. An employer has the right to hire and employ his servants so long as he does not discriminate against the employee on account of Union activities. The following authorities are directly in point:

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; N. L. R. B. v. Columbian Co., 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; International Brotherhood of Electrical Workers v. N. L. R. B., 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed. 1524; Remington-Rand v. N. L. R. B., 58 S. Ct. 1046,

304 U. S. 576, 82 L. Ed. 1540, re-hearing denied 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549.

(3) The decision of the United States Circuit Court of Appeals holding that Petitioner discriminated in regard to the hire and tenure of W. A. Taylor and directing his re-instatement is in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. Air Associations, 121 Fed. (2d) (2 Cir.) 586; Quaker State Oil Refining Co. v. N. L. R. B., 119 Fed. (2d) (3 Cir.) 631; Virginia Electric & Power Co. v. N. L. R. B., 115 Fed. (2d) (4 Cir.) 414; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) (6 Cir.) 624; N. L. R. B. v. Illinois Tools Works, 119 Fed. (2d) (7 Cir.) 356; Wilson & Co. v. N. L. R. B., 103 Fed. (2d) (8 Cir.) 243; N. L. R. B. v. Union Pacific Stages, 99 Fed. (2d) (9 Cir.) 153; N. L. R. B. v. Stover, 114 Fed. (2d) (10 Cir.) 513.

(4) The decision of the Circuit Court of Appeals that the Petitioner had refused to bargain collectively with the Union is in conflict with applicable decisions of this Court in that the same is unsupported by substantial testimony.

The Board found that the Petitioner had refused to bargain collectively with the Union (R. 194). The testimony in respect to the charge is found by Alfred Jones (Tr. 430), and the testimony of B. F. Berman (Tr. 493), from which it conclusively and undisputedly admitted that Mr. Berman, appropriate executive of the Company had numerous conferences with the bargaining agent of the Union, but was unable to reach a conclusion. There is not a scintilla of evidence justifying inference that the Petitioner and officers did not bargain sincerely. They were unable to reach an agreement, but proof of failure to reach an agreement is far short of refusing to bargain.

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1; 81 L. Ed. 393; 108 A. L. R. 1352.

(5) For the same reason, the decision of the Circuit Court of Appeals of the Fifth Circuit is in conflict with the decisions of other Circuit Courts of Appeal on the same matter.

N. L. R. B. v. Columbian Enameling & Stamping Co., 306 U. S. 292; N. L. R. B. v. Lion Shoe Co., 97 Fed. (2d) (1st Cir.) 448; Black Diamond S. S. Corp. v. N. L. R. B., 94 Fed. (2d) (2 Cir.) 875.

The decision of the Circuit Court of Appeals is contrary to the decision of this Court dealing with the subject matter and a very marked conflict exists in the various Circuit Courts of Appeal on the questions decided in this case, which should be reconciled. The decision in this case is contrary to decisions in other circuits dealing with the same questions. Therefore, this case is an appropriate one for the exercise by the Court of its authority to review on certiorari.

WHEREFORE, your petitioner respectfully prays that a Writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in this case numbered and entitled on its docket, "Stonewall Cotton Mills, Inc., Petitioner, vs. National Labor Relations Board, Respondent", and that the judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and your Petitioner prays for such other further and general relief in the premises as to this Honorable Court may seem meet and just, and your Petitioner will ever pray.

This petition for certiorari is accompanied by ten printed certified copies of the original and supplemental record with

exhibits, with one certified typewritten copy of the evidence used by the Circuit Court of Appeals of the Fifth Circuit in the determination of the case.

W. H. Watkins,
P. H. Eager, Jr.,
J. A. Covington,
Edwin L. Snow,
Gabe Jacobson,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 346

STONEWALL COTTON MILLS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered on June 3, 1942 (R. 226). The decision of the court overruling the motion for a rehearing was rendered on July 6, 1942 (R. 253), copies of which are attached as Appendices 1 and 2.

II.

Jurisdiction.

Jurisdiction is invoked under the Judicial Code, Sec. 240, as amended by Act of February 13, 1925; 43 Statutes at Large 938, Sec. 347, U. S. Ann. Code, Title 28.

III.

Statement of the Case.

Reference is respectfully made to "A Summary Statement of Matters Involved," *supra,* in the petition for certiorari, as a statement of petitioner's case.

IV.

Specifications of Error.

Specification No. 1.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the petitioner had restrained and coerced its employees, as found by the Board, in violation of Section 8, Paragraph 1, of the National Labor Relations Act, and in ordering petitioner to desist.

Specification No. 2.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that petitioner discriminated in regard to the hire and tenure of W. A. Taylor, in violation of Section 8, Paragraph 3, of the Act, and in directing petitioner to reinstate the said Taylor with back pay.

Specification No. 3.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that petitioner had refused to bargain collectively with the union in violation of Section 8, Paragraph 5, of the Act, and in ordering petitioner to desist therefrom.

Specification No. 4.

The Circuit Court of Appeals for the Fifth Circuit committed error in failing and refusing to annul and set aside

the order of the National Labor Relations Board complained of.

Specification No. 5.

The Circuit Court of Appeals for the Fifth Circuit committed error in affirming the order of the National Labor Relations Board, in the particulars set out in Specification No. 1 and Specification No. 2, and not refusing to annul and set aside the same.

ARGUMENT.

Point I.

The Circuit Court of Appeals of the Fifth Circuit committed error in holding that the petitioner restrained and coerced its employees in the exercise of rights guaranteed under Section 7 of the Act, and in violation of Paragraph 1, Section 8 of the Act, for that such finding is not supported by substantial evidence.

It is well settled that the findings of the National Labor Relations Board must rest upon substantial evidence. The test is not satisfied by evidence which merely creates suspicion or which amounts to no more than a scintilla of evidence. The following authorities are directly in point:

Consolidated Edison Co. v. *N. L. R. B.*, 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *N. L. R. B.* v. *Columbian Co.*, 306 U. S. 292, 59 S. Ct. 501, 83 L. Ed. 660; *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 58 S. Ct. 1041, 305 U. S. 555, 82 L. Ed. 1524; *Remington-Rand* v. *N. L. R. B.*, 58 S. Ct. 1046, 304 U. S. 576, 82 L. Ed. 1540, re-hearing denied, 58 S. Ct. 1054, 304 U. S. 590, 82 L. Ed. 1549. *N. L. R. B.* v. *The Lion Shoe Co.*, 97 Fed. (2d) (1st Cir.) 448; *Ballston-Stillwater Knitting Co.* v. *N. L. R. B.*, 98 Fed. (2d) (2 Cir.) 758; *Republic Steel Corp.* v. *N. L. R. B.*, 107 Fed. (2nd) (3 Cir.) 472; *Martel Mills Corp.* v. *N. L. R. B.*, 114 Fed. (2d) (4 Cir.) 624; *N. L. R. B.* v. *Gosher Rubber & Mfg.*

Co., 110 Fed. (2d) (6 cir.) 432; *Foote Bros.* v. *N. L. R. B.*, 114 Fed. (2d) (7 Cir.) 611; *Hamilton-Brown Shoe Co.* v. *N. L. R. B.*, 104 Fed. (2d) (8 Cir.) 49; *N. L. R. B.* v. *Grower-Shipper Assn.*, 122 Fed. (2d) (9 Cir.) 368.

Section 7 of the National Labor Relations Board Act, being Title 29, U. S. C. A., Section 157, is in the following language:

> "*Right of employees as to organization, collective bargaining, etc.*
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection. (July 5, 1935, c. 372, Sec. 7, 49 Stat. 452."

Section 8 of the Act, being Title 29, U. S. C. A., Section 158, contains the following language:

> "*Unfair labor practices by employer defined.*
>
> It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; Provided, That subject to rules and regulations made and published by the Board pursuant to Section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor

organization: Provided, that nothing in Sections 151-166 of this title, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in sections 151-166 of this title as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under sections 151-166 of this title.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (q) of this title. (July 5, 1935, c. 372, Sec. 8, 49 Stat. 452."

The National Labor Relations Board (R. 165) held that the petitioner interfered with, restrained and coerced its employees in the exercise of rights guaranteed by the act.

In order to determine that the finding of the Board is unsupported by substantial evidence, we will slightly review the evidence, which is undisputed.

The finding of the Board was based upon an alleged telephone conversation had between Harrington, secretary of the petitioner, and Berman, manager thereof, over long distance telephone to Cincinnati, where the latter was. According to the evidence, the local union caused notices to be published of a meeting of the local union, composed largely of petitioner's employees. Berman suggested, so it is claimed, that some one go to the meeting and mingle with the employees. However, according to the evidence, Berman reconsidered and told Harrington, the secretary, to consult the company's attorney, Mr. Jacobson, but no action was taken by the petitioner at the meeting. There

was absolutely no evidence of any action on the part of any of the petitioner's officers or agents to influence its employees with respect to the meeting because Harrington denied and Berman denied that any such conversation took place over the telephone. The Board made its findings, although there was no testimony of any character that as a result of the conversation, or otherwise, there was any action on the part of the petitioner or its officers to influence or coerce its employees.

Therefore, we submit that the charge is not supported by testimony of any character, whether substantial or not. Even if it be true that the telephone conversation took place and the Board disbelieved Harrington and Berman in their statements that the conversation did not take place, nothing is proved.

The testimony in respect thereto will be found at Tr. 592, Tr. 595, and Tr. 1190.

The finding of the Board was further based on the charge of anti-union expressions of President Berman in December, 1938 (R. 168). The only testimony with respect thereto will be found at Tr. 135 and Tr. 1221.

Berman, the president of the company, is charged with having stated at a meeting of the members of the local union and representatives of the union, that he would have to shut the mill down if he were to change his former policy of never signing such a contract, explaining that he had never done so. We respectfully submit that a reading of the testimony shows that Mr. Berman never made any such statement. The testimony shows that what he really said was that he would have to shut down if he had to pay cut wages, and if he had to change his policy at that particular time when he was putting a new fabric on the market, and if his mill continued losing money.

It was undisputed that Mr. Berman suggested that the union hold an election, and that if a majority wanted to

join the union, that they would get together and work out an agreement satisfactory to both sides (Tr. 45-46).

There is nothing in the record to indicate that Mr. Berman's statements were intended to coerce anybody, or that the union's representatives so considered the same, and it is undisputably shown that the statements did not have the effect of coercing the union or that the activities of petitioner's employees or the union were affected by this statement in the slightest degree. A large number of petitioner's employees became members of the union and remained in petitioner's employ.

The finding of the Board is based also on an alleged anti-union expression of a man by the name of Priester in the employ of the petitioner. It is alleged that Priester was informed by Holloman that a union was going to be formed. He asked, "What sort of a union is that you all are getting up now?" To which Holloman replied, "It is the A. F. of L." Whereupon Priester wanted to know whether Holloman was a member, and Holloman replied that he was.

The testimony in respect thereto is found at Tr. 248, and Tr. 1095.

It was again charged that Privett had said to Holloman that he had better get out of the union and stay out of it or the mill will shut down and starve us to death (R. 167).

The testimony with respect thereto will be found at Tr. 42, Tr. 251, Tr. 1096, Tr. 1585.

Again, the Board charged (R. 170) that Privett, an overseer, stated that if he did not stop associating with certain employees he was going to discharge him. The testimony is found at R. 170, and Tr. 1586, and Tr. 1001.

Again, the Board charged that Harrington was guilty of anti-union expressions (R. 172), wherein he had referred to Taylor as an agitator and trouble-maker. The testimony in respect thereto will be found at Tr. 393, 396, 397, 399, and 400.

Again, the Board found that McCrary, the head card grinder (R. 173) remarked that he would not work organized labor at all, and that if the plant became a closed shop he would pack his tool box and leave. The testimony in respect thereto is found at Tr. 1550, 1554.

The testimony showed that Stonewall, Mississippi, is an isolated community of some 2,000 people, living in an unincorporated village, twenty miles distance from the nearest town. The petitioner owns the property and houses and most of the families work in the mills. This is a rural section where the people all know each other, and most of them are related by blood or marriage. The evidence indicates that such statements complained of were merely isolated statements, but lose all significance when surrounded by the actual facts. There is nothing to indicate that the remarks had the slightest effect in preventing or discouraging union membership, and there is no connection that the statements had any effect on union activities.

There were employed at the mill 900 employees. 427 were union members, and the alleged complaints deal only with a few casual remarks among fellow employees, friends and relatives.

The authorities are thoroughly established that mere casual remarks, which do not appear to have been acted upon or influence union activity, are insufficient to establish coercion.

In the case of *Diamond T. Motor Car Co.* v. *N. L. R. B.*, 119 Fed. (2d) 978, where the superintendent of the company stated that if the owner of the plant found that there was a union organized, that he would lose his job, and the plant would be closed down, the court held that the statement, if made, was not to be defended, but it should be considered in the light of its effect upon the employees spoken to, and since it had no effect, the employer was not guilty of coercion or restraint.

The court used the following language:

"The Board also stresses the statement of Superintendent Courval to employee Tishcovske wherein he is alleged to have said that Mr. Tilt would not stand for an outside union and that they would lose their jobs. This statement if made is not to be defended, but it should be considered in the light of its effect upon Tishcovske as it was made to him alone. Apparently it did not impress Tishcovske, for he did not see fit to mention it in his discussion at the employees' meeting following Pierce's speech. Tishcovske later joined United and there is no evidence that he ever mentioned the supposed remark until the hearing before the examiner. Moreover, Pierce was the man highest in authority at the plant and his subsequent declaration to the men, where he openly and frankly told them that the problem was their own and that they were free to join any organization of their choosing in effect overrode and disavowed the previous expression of Courval.

"We likewise believe that the occasional inquiries of Pierce and others with relation to the circulation of C. I. O. cards and with reference to labor activities in the plant are overemphasized by the Board. It is to be noted that the trial examiner who heard the witnesses testify did not believe that the Company had interfered with or dominated Industrial. While this was not binding upon the Board in their consideration of the matter, it is strongly indicative of the character of the testimony.

"We think the evidence, considered as a whole, falls short of being substantial proof of dominance or coercion or unfair labor practices. In giving recognition to that freedom of action guaranteed the employee by the statute, care must be taken that in preserving it for the one we do not by the same act deny it to another. The petition of the company for vacation of the Board's order is allowed and the petition of the Board for enforcement is denied."

The following authorities are directly in point:

N. L. R. B. v. *Empire Furniture Co.*, 107 Fed. (2d) 92; *Martel Mills Corp.* v. *N. L. R. B.*, 114 Fed. (2d) 624; *N. L. R. B.* v. *Sands*, 306 U. S. 332; *Quaker State Oil Refining Co.* v. *N. L. R. B.*, 119 Fed. (2d) 631; *N. L. R. B.* v. *Air Associates, Inc.*, 121 Fed. (2d) 586; *N. L. R. B.* v. *Mathieson Alkali Works*, 114 Fed. (2d) 796; *N. L. R. B.* v. *Whittier Mills*, 111 Fed. (2d) 474.

The Board also made a finding (R. 171) that the petitioner was guilty of coercion by a certain notice posted by the petitioner calling attention of its employees to the approaching meeting. The testimony in respect thereto will be found at Tr. 162, 163, 326, and 1273.

Again, it was complained that the petitioner, while the election was in progress, urged its employees to take time off from their work in order to cast their vote (R. 171). The testimony in respect thereto will be found at Tr. 1276.

We respectfully submit that Mr. Berman's notice was a helpful and unbiased explanation made for the benefit of the petitioner's employees, and at their request. The notice was fair and explicit, and certainly the petitioner should not be condemned, but, upon the other hand, commended for permitting the employees to leave their machines during production hours, to vote in the election.

It is not contended that some of the employees had the privilege and others did not, or that there was any kind of disagreement. The testimony shows that every employee had the privilege of leaving his job and voting, and that the union won the election.

The authorities are well settled that mere friendly intercourse between employers, labor organizations, and its employees, in respect to union activities, does not constitute and is not a violation of the act in the absence of interference and coercion. The employer has a perfect right

to express an honest opinion or to state its policy and position.

N. L. R. B. v. *Union Pacific Stages*, 99 Fed. (2d) 153; *N. L. R. B.* v. *Asheville Hosiery Co.*, 108 Fed. (2d) 288; *Midland Steel Products Co.* v. *N. L. R. B.*, 113 Fed. (2d) 800; *Continental Box Co.* v. *N. L. R. B.*, 113 Fed. (2d) 93; *Press Co., Inc.* v. *N. L. R. B.*, 118 Fed. (2d) 937; *Jefferson Electric Co.* v. *N. L. R. B.*, 102 Fed. (2d) 949; *Virginia Electric & Power Co.* v. *N. L. R. B.*, 115 Fed. (2d) 414.

Point II.

The Circuit Court of Appeals of the Fifth Circuit committed error in holding that the petitioner had discriminated in regard to the hire and tenure of employment of W. A. Taylor in violation of the Act, because not supported by substantial evidence.

The decision of the Board will be found at R. 199. The testimony in respect thereto will be found at Tr. 151, 155, 157, 159, 165, 182, 183, 189, 190, 200, 600, 622, 703, 737, 778, 811, 843, and 1187.

The complaint concerning Taylor is based on the idea that as Taylor had quite a career in union affairs at Stonewall, had openly opposed the company in such matters, and had caused it inconvenience and annoyance, the company desired to punish him. It was shown that he was laid off. The petitioner claimed that Taylor's union activities were not taken into account in letting him off. The evidence established that Taylor was an indifferent and unfaithful worker; that his place was filled by more capable workers and that Taylor did not seriously seek the employment. It was undisputably shown that at the time Taylor was laid off that there was not enough work for three roving haulers; that it was a job for two men. The employer decided to let Taylor go and retain the other two,

both of whom were union men. Taylor admitted that his daughter, his son-in-law, and his daughter-in-law were working at the mill (R. 218).

There was no conflict in the evidence offered by the petitioner in respect to the occasion for the discharge of Taylor. It was not disputed. The witnesses offered were not impeached, and the conclusion drawn by the Board is not based upon substantial evidence but suspicion, and is not even supported by a scintilla of evidence. The inferences drawn by the Board under the evidence were not justified.

The presumption is that the employer did not violate the law, and the burden of proof is on the Board. If the employer's witnesses, as they did in this case, swear to the facts as existing for grounds of discharge, those witnesses must be impeached or contradicted. Such testimony cannot be simply ignored and disregarded.

The mere fact of membership in the union is not a guarantee against discharge, and where real grounds exist, it does not prevent it. The National Labor Relations Board has no managerial authority, and may not substitute its judgment for that of the employer. The Act requires that discrimination in regard to tenure of employment for both the purpose and effect of discouraging union membership. The Board does not have unlimited discretion in weighing the evidence concerning discharge. If real grounds appear, the employer has the right to discharge the employee though the facts may be capable of an inference that union activities were the occasion of the discharge. After all the employer is responsible for the management of the plant and has the right to employ whom he chooses and discharge any employee whom he sees fit for the proper management and conduct of the business, provided he does not discharge the employee for the purpose of discouraging union activities and the discharge has that effect.

The following authorities are directly in point:

Jefferson Electric Co. v. *N. L. R. B.*, 102 Fed. (2d) 949; *N. L. R. B.* v. *Sands*, 96 Fed. (2d) 721; *Waterman Steamship Corp.* v. *N. L. R. B.*, 103 Fed. (2d) 157; *N. L. R. B.* v. *Stover*, 114 Fed. (2d) 513; *Virginia Electric Co.* v. *N. L. R. B.*, 115 Fed. (2d) 414; *N. L. R. B.* v. *Union Mfg. Co.*, 124 Fed. (2d) 332.

Point III.

The Circuit Court of Appeals for the Fifth Circuit committed error in holding that the petitioner had refused to bargain collectively with the union in violation of the Act, because not supported by substantial evidence. The Board so found (R. 194). The evidence will be found at Tr. 430, 442, 447, 451, 453, 460, 461, 462, 463, 474, 522.

It is undisputed that there was continuous bargaining between the petitioner and the union. There is no proof in the record that petitioner did not meet and discuss those matters with an open and fair mind and with the intention to reach an agreement. The failure to agree cannot be said to have been attributable any more to the action of the petitioner than to the union's representatives. The parties were dealing with matters of a highly controversial nature. The petitioner is not to be charged with bad faith merely because it would not accede to the wishes of the National Labor Relations Board.

The authorities are well settled that it is not obligatory upon the part of an employer to enter into an agreement. It is only necessary that they meet and bargain collectively.

N. L. R. B. v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; 81 L. Ed. 393; *N. L. R. B.* v. *Bell Oil & Gas Co.*, 91 Fed. (2d) 509; *Black Diamond S. S. Corp.* v. *N. L. R. B.*, 98 Fed. (2d) 875; *Globe Cotton Mills* v. *N. L. R. B.*, 103 Fed. (2d) 91; *N. L. R. B.* v. *Lion Shoe Co.*, 97 Fed. (2d) 448.

We respectfully submit that the findings of the Board in the particulars hereinbefore mentioned are not supported by substantial evidence, and that the Circuit Court of Appeals for the Fifth Circuit committed error in enforcing the order of the Board and refusing to set the same aside. The Board has based its findings upon evidence that merely creates suspicion and rests upon nothing more substantial than guess and conjecture. The Board disregarded undisputed evidence inconsistent with its findings, and the Circuit Court of Appeals committed error in affirming its action.

We, therefore, respectfully submit that the decision of the Circuit Court of Appeals in this case is contrary to the applicable decisions of this Court and is contrary to the decisions of other Circuit Courts of Appeals dealing with the same matter.

In support of this proposition and in order to avoid repetition, we now refer the Court to the authorities assembled in sub-division "C" of petitioner's petition for a writ of certiorari, and ask that the same be considered as if set out in full herein.

Conclusion.

This is a case, therefore, which we respectfully submit calls for the exercise by the Court of its supervisory powers in order that the law may be finally settled, in order that the errors complained of might be corrected; that a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Fifth Circuit, and that the same should be finally reversed.

J. A. Covington, Jr.
Gabe Jacobson.
E. L. Snow.
William H. Watkins.
P. H. Eager.

APPENDIX NUMBER ONE.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 10110.

STONEWALL COTTON MILLS, INC., *Petitioner,*

versus

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

(June 3, 1942.)

For the Board:

Argued by: Mr. Van Arkel.
On the brief: Messrs. Watts, Gross, Van Arkel, Beck, and Sachs.

Before Hutcheson, Holmes, and McCord, Circuit Judges.

HUTCHESON, Circuit Judge:

Ordered, to cease and desist from unfair labor practices,[1] to reinstate three employees[2] found to have been discriminated against in regard to their hire and tenure of employment, to bargain collectively with the Union,[3] and to post appropriate notices, petitioner brings this proceeding to set aside or modify the order. The respondent, by answer and cross petition, seeks its enforcement.

While many subordinate and incidental facts are relied on to make them up, there are three ultimate findings on

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[1] (a) By discriminating in regard to the hire and tenure of employment of three employees thereby discouraging membership in the union within the meaning of Section 8 (3) of the Act; (b) by refusing to bargain collectively with the union, thereby engaging in unfair labor practices within the meaning of Section 8 (5) of the Act; (c) by interfering with, restraining and coercing its employees in the exercise of its rights within the meaning of Section 8 (1) of the Act.

[2] W. A. Taylor, C. A. Holliman, and Hill Logan.

[3] Textile Worker's Federal Local Union No. 21723.

* 36 N. L. R. B. 240.

which the orders are based. One is concerned with the discharges in violation of Section 8 (3), another with the refusal to bargain in violation of Section 8 (5), the third with other acts of interference, restraint and coercion in violation of Section 8 (1) of the Act. Fully mindful, of course, that the evidence in the record must be considered as a whole and that the whole and each piece of it must be given its proper place and weight as it bears upon each and all of the findings, our function is performed when we determine as to each of the findings, whether it is supported by substantial evidence.

Respondent and petitioner have fully briefed the law. Each has set the record out as it sees it. As to the law of a case of this kind, the statute is so plain and so much has been written that we need not write at length on it. It is sufficient to say that our function here is to examine the record for ourselves and determine, as we do in a review of cases tried to a jury, where the claim is that the verdict is without support in the evidence, not what findings we think the triers ought, upon the evidence, to have made, but whether the findings they did make are supported by substantial evidence, that is, whether reasonable and unbiased minds could have reached the conclusions and made the findings that were made. If therefore, there is any substantial conflict in the evidence as to any of the facts found by the Board, its findings resolving that conflict are binding on us. Further though the evidence is without conflict, if more than one inference can reasonably be drawn from it, the Board's determination as to the inference to be drawn likewise binds us. Only where there is no substantial conflict in the evidence and only one permissible inference may be drawn from it, when, in short, what the evidence amounts to is a question of law rather than of fact, are we permitted to set aside findings of the Board as without support in the evidence.

Examining the record with these considerations in mind, and resolving all the conflicts in the evidence and all permissible conflicting inferences therefrom, in favor of the Board's findings, we think it may not be doubted that there is substantial evidence to support the findings of the Board, (1) that in violation of Section 8 (1), petitioner did inter-

fere with its employees in the exercise of the rights guaranteed by Section 7, and (2) that in violation of Section 8, Subdivision (5) it refused to bargain collectively with the representatives of its employees. Anti-union bias is not prohibited by law and therefore is not of itself sufficient proof of a violation of the rights the law guarantees, but where, as here, there is clear proof of such bias, it may be looked to and considered by the Board for the color and point it gives to speech and action, otherwise equivocal and of doubtful meaning. We must keep in mind too, that as the question of refusal to bargain comes to us here, we have not the problem with which we had to deal in *N. L. R. B.* v. *Whittier Mills*, 123 F. (2d) 725, of determining for ourselves whether the conduct of the company in relation to the bargaining conferences, constituted a contempt of and refusal to obey our order, and whether therefore, they should be adjudged in contempt because thereof. Our function here is not to decide what inference we would draw from the facts presented but whether reasonable minds could draw the one the Board did. Examined in the light of these views, we think it perfectly clear; that the evidence of what was done and what was not done by the company, both before and in connection with the bargaining efforts, substantially supports the inferences the Board drew, (a) that the anti-union acts of the company's employees in violation of Section 8 (1), were the acts of the company, and (b) that the efforts at bargaining were not real efforts but mere shadow boxing to a draw; and that we cannot say they could not have been drawn by reasonable and unbiased minds. We therefore affirm the Board's findings (1) that there was a refusal to bargain, and (2) that there has been interference in violation of Section 8 (1), and decree enforcement of its order that petitioner cease and desist therefrom and that it do bargain with the union.

When it comes to the layoffs and discharges found to have been in violation of Section 8 (3) of the Act,[4] the case

[4] It shall be an unfair labor practice for an employer • • • (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

stands differently. The courts have pointed out so often that it need not be elaborated here that though the fact of union activity or office in the union is a fact to be considered by the Board in connection with other facts bearing upon the issue, the affirmative of which is on the Board as accuser to establish before itself as trier, *Magnolia Petroleum Co.* v. *N. L. R. B.*, 112 F. (2d) 545; *N. L. R. B.* v. *Riverside Mfg. Co.*, 119 F. (2d) 307; *N. L. R. B.* v. *Tex-O-Kan.*, 122 F. (2d) 433; *N. L. R. B.* v. *Union Mfg. Co.*, 124 F. (2d) 332, the invoked section does not, of course, mean that membership or office in a union is a guarantee against discharge, layoff or demotion. An employee, though he belongs to or is an officer of a union, may, like any other employee, be discharged for any reason or for no reason at all, unless it is for a reason prohibited by the Act. It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity. To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review. *N. L. R. B.* v. *Air Associates*, 121 F. (2d) @ 592.

As to Taylor, if the issue here were that antipathy to him because of his union activities was the moving reason for his discharge, it might, though the testimony of Richardson who laid him off was "that he did not lay off Taylor for union activity and that he did not know that Taylor belonged to the union but that he had to lay off one of the roving haulers and the two kept were faster men and better workers than Taylor", and there was abundant evidence in support of it, be said that the Board's finding should be sustained, for the evidence as to the time of his layoff, the statements made to and about him before it occurred and the fact of his activity in the union, might well, in connection with respondent's anti-union bias, be held sufficient to justify a reasonable and unbiased inference that contrary to the claim of the company, he was laid off because of antipathy against him because of his union activities. There is not a shred of evidence however that his laying off had any effect whatever to discourage membership in a union

and there is positive evidence that his brother, a member of the union, his daughter, his son-in-law, and his daughter-in-law, all continued to work at the mill.

As to Holliman, we think it clear that reasonable and unbiased minds could not upon the undisputed evidence in the record, showing that he was discharged because of a row he had over his pay, legally draw the conclusion either that he was discharged to discourage or that his discharge did discourage membership in the union. Fully supporting respondent's version of the matter, Holliman himself testified, "I disremember what all he said to me, but I lost my temper completely." On the issue of the effect of the discharge there is no evidence whatever that any person left the union or was discouraged in belonging to it or was in any manner influenced by the discharge. Holliman himself admits that his wife, his brother and other relatives are still working at the mill. Logan's case is still less supported. The Board in its brief, points to no fact evidencing, or pointing to, a purpose to discharge Logan for union activity. It bases its finding entirely upon the fact that he was elected vice-president of the union in 1939, and participated in the bargaining conference on January 8, 1940. He was discharged on January 25, 1940, upon the undisputed testimony of Privett, Logan's overseer that though he had a high respect for Logan and he had always been a good man, he had been irregular in his attendance and the cards in the mill where he worked were not in a satisfactory condition, and that he would have put Logan back to work if Logan had assured him of future regularity in his attendance.

But if we assume that the action, with regard to Logan, evinced a purpose to discourage union membership, there is no evidence whatever that it had any such effect. The record shows that there is no claim that any other union has gotten or is trying to get a foothold in the plant, or that the complaining union has in any wise lost any part of its clear majority or of its influence in the plant. In view of the fact that the Board functions at once as accuser and judge, it cannot be too often or too clearly repeated that

just as the act does not permit an employer to interfere with the self-organization of its employees, neither does it authorize the Board to interfere with the management of the company or with the legitimate hiring or firing of employees. It must too be always kept in mind that the burden was on the Board as accuser, under Section 8 (3), in order to establish the facts authorizing itself as judge to find that persons were laid off in violation of it and to require their reinstatement, to show not that they were laid off without sufficient excuse, or even that they were laid off because of antipathy against them because of their union activity, but that their laying off was, the unfair labor practices denounced by Section 8 (3), "by discrimination, etc., to encourage or discourage membership in a union." That same burden is on it here when as petitioner seeking enforcement of its order, it seeks to point out to us that its findings as judge, that this was established, are supported by substantial evidence.

We hold therefore that the order of the Board, except that part of it requiring the reinstatement with back pay of Taylor, Holliman, and Logan, be not set aside but enforced, and that that part of it which requires their reinstatement be not enforced but set aside.

——— ———,
Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

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APPENDIX NUMBER TWO.

OPINION ON PETITION FOR REHEARING—Filed July 6, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 10110.

STONEWALL COTTON MILLS, INC., *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Petition for Review of an Order of the National Labor Board, Sitting at Washington, D. C.

ON MOTION FOR REHEARING.

(July 6, 1942.)

Before Hutcheson, Holmes, and McCord, Circuit Judges.

By the COURT:

Respondent, in its motion for rehearing, insists that there was error in the holding of our opinion, that the Board's finding that the discharge of Taylor, had the effect of discouraging membership in the union, was without support in the evidence. We agree.

The opinion will therefore be modified; by withdrawing the last sentence on page 5 as to Taylor and re-writing it so that it will read as follows: "Too, while there is not a shred of positive evidence that his laying off was for the purpose or had the effect of discouraging membership in a union, and there is positive evidence that his brother, a member of the union, his daughter, his son-in-law and his daughter-in-law, all continued to work at the mill, we cannot say that the Board's inference that his discharge had the effect of discouraging union activity is unsupported"; and by striking Taylor's name from the last para-

graph of the opinion. The motion for rehearing will accordingly be granted as to Taylor's discharge and the Board's order will be enforced as to him.

It insists too that we erred in holding that there is no evidence that the discharges of Holliman and Logan had the effect of discouraging membership in the union. Again we agree. The opinion will therefore be modified as to Holliman and Logan; by withdrawing the first two sentences at the bottom of page 5 and re-writing them to read as follows: "As to Holliman, we think it clear that reasonable and unbiased minds could not upon the undisputed evidence in the record, showing that he was discharged because of a row he had over his pay, legally draw the conclusion that he was discharged to discourage membership in the union. Fully supporting respondent's version of the matter, Holliman himself testified, 'I lost my temper completely.' "; and by withdrawing the first two sentences at the top, and the first two of the second paragraph of page 6.

Finally, it insists that we erred in holding that the evidence does not support the Board's finding that Holliman and Logan were discharged not for cause but to discourage membership in the union.

We do not agree.

The motion for rehearing as to Holliman and Logan is therefore, Denied.

(1819)

INDEX

CITATIONS

485535—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 346

STONEWALL COTTON MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 226–231)[1] and its opinion on the Board's petition for rehearing (R. 253–254) are reported at 129 F. (2d) 629. The findings of fact, conclusions of law, and order of the

[1] The printed record for purposes of the petition for certiorari consists of: (1) the printed "transcript of record" in the court below, containing the complaint, decision of the Board and other papers, and appended opinions of the court below together with the Board's petition for rehearing, which is referred to herein by the symbol (R.); and (2) the printed appendix to the Board's brief in the court below, which is referred to herein by the symbol (B. A.).

National Labor Relations Board (R. 158–218) are reported at 36 N. L. R. B. 240.

JURISDICTION

The decree of the court below (R. 255–257) was entered on August 1, 1942. The petition for a writ of certiorari was filed on August 28, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence to support the Board's findings that petitioner had interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, had refused to bargain collectively in violation of Section 8 (5) and (1) of the Act, and had discriminatorily discharged one W. A. Taylor in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon charges filed by Textile Workers Federal Local Union 21723, affiliated with the American Federation of Labor (R. 22–24), hereinafter called the Union, and after the usual proceedings, the

Board, on October 20, 1941, issued its findings of fact, conclusions of law, and order (R. 158–218). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[2]

In August 1938 the Union began an organizing campaign among petitioner's employees, and notices of an open meeting were posted (R. 165; B. A. 244, 44–46). Upon learning of the scheduled meeting, petitioner's secretary telephoned its plant manager, B. F. Berman, who suggested that if petitioner's attorney approved, some "friends" of petitioner arrange to be present at the meeting to remind the employees of certain unrealized promises made by organizers during a previous campaign in 1934 (R. 165; B. A. 244–246, 248). Petitioner's superintendent thereafter made efforts to have employees attend the meeting (R. 166; B. A. 247–249).

Shortly after the meeting, certain of petitioner's supervisory employees engaged in coercive conduct. Petitioner's night superintendent inquired of one employee "Don't you know that Mr. Berman would fire you and run you off from here for joining the union?" and added that "he will shut this mill down and let the weeds grow up as high as a hill before he will recognize a union" (R. 167; B. A. 90). Another supervisor (R. 167; B. A. 10) told an employee that he "had better get out of

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

that mess [the Union] and stay out of it or the Stonewall Cotton Mills [would] shut down and starve [its employees] to death" (R. 167; B. A. 11). Later, in 1939, an overseer told an employee "You are talking about this damned union a whole lot. I am going to fire you and run you off from here, if you don't stop it" (R. 170; B. A. 96–97). Another employee was warned by supervisors not to associate with the Union leaders under penalty of discharge (R. 170; B. A. 389, 390, 46), and other coercive statements were made by persons in positions of authority (R. 172, 173; B. A. 129–131, 135, 136–137, 382).

By November 1938 the Union represented a majority of the employees (B. A. 46–47) and a conference was arranged with petitioner's president, Oscar Berman. He informed the committee that he had not signed a union contract in 30 years and would have to shut the mill down if he departed from that policy (R. 168; B. A. 53, 127–128); he refused to receive a copy of a proposed contract which the committee tendered on the following day and repeated his refusal to sign an agreement (R. 168; B. A. 54–56). At a meeting between the committee and Harrington, petitioner's secretary, in December 1938, Harrington stated that while he was opposed to a union, he would be in favor of a company union. He asked "Why don't you let this thing [the Union] alone" (R. 168–169; B. A.

57–58, 139–140), and also refused to receive a copy of the proposed agreement (B. A. 58–59).

At the November meeting, President Berman had promised to meet the Union committee in January 1939 (R. 168; B. A. 53); he did not fulfill that promise and ignored a request for a conference made by the Union in February (R. 169; B. A. 59–60). A meeting was finally held in April; for the first time Berman raised a question as to the Union's majority status [3] (R. 169; B. A. 62–63, 66). The Union proposed that its membership records be checked by a Board representative but Berman declined (B. A. 63); he also refused to consent to an election to be held by Board representatives on the ground that Board representatives did not agree to allow petitioner to electioneer against the Union (R. 170; B. A. 65). Formal proceedings under Section 9 of the Act were instituted, and an election was held by direction of the Board in November 1939. The Union won by a substantial majority and was certified as exclusive bargaining representative of petitioner's employees (R. 176; B. A. 393–394).[4]

[3] On the day following this meeting at which Berman questioned the Union's majority, W. A. Taylor, the leader of the Union, was discharged under circumstances which the Board found to be discriminatory (R. 194–199). See *infra*, pp. 8–9.

[4] Prior to the election, Manager Berman caused notices to be posted, which, the Board found, were designed to influence the election results (R. 171–172; B. A. 391–393). The notice announced that the results of the election would not change the minimum wages provided by law (R. 171; B. A.

In January 1940 the Union arranged a meeting with petitioner at which the Union presented its proposals. Manager Berman promised to submit a counterproposal at the next meeting (R. 177–178; B. A. 144–150, 395–401). But at the following conference, Berman produced no counterproposal; instead, he confined himself simply to a rejection of each item in the Union's proposed agreement (R. 178–179; B. A. 152–156). The Board found that certain of the grounds for rejection of the Union proposals were spurious (R. 188); for example, Berman denied the request for a closed-shop agreement on the ground that it violated the employees' "constitutional rights" not to join a union (R. 178; B. A. 154, 360) although petitioner's parent corporation, of which Berman was also an official, operated under a closed-shop agreement (R. 168, 178; B. A. 369–370). At another conference during January, at which a representative of the Conciliation Service was present, petitioner failed to produce a counterproposal, though the Union steadily

392). It also stated that the issue in the election was whether the employees desired to be represented by the Union or to "continue [the] present method of being able to speak for [themselves] in [regard to terms and conditions of employment] with [their] overseer, superintendent and any other company officials" (R. 171; B. A. 391–392). The Board found that in the light of petitioner's repeatedly announced hostility to the Union, the employees necessarily understood the notice to mean that petitioner desired them to vote for "the present method" of individual bargaining and against the Union (R. 172).

yielded ground on its demands (R. 179–180; B. A. 156–160). In March, in a letter to the Board, petitioner stated that it would not "commit itself to the signing of a collective-bargaining agreement" but would "negotiate a verbal agreement" (R. 180; B. A. 402), a statement which petitioner also made at a further meeting with the Union about the same time (R. 180; B. A. 162–163). At the same meeting petitioner proposed that all wages be reduced to the minimum allowable under the Fair Labor Standards Act (R. 180–181; B. A. 167–168).

Petitioner finally presented the promised counterproposal in May 1940, about a year and a half after negotiations had begun, some six months after the Union had prevailed in the election, and four months after promising its submission. The counterproposal proposed the exclusion of some 40 to 50 percent of the Union members from its coverage (R. 183; B. A. 180), thus challenging the unit which the Board had found to be appropriate for collective-bargaining purposes (R. 175, 191–192; B. A. 393), and provided that the excluded employees should not be eligible to membership in the Union or solicited to join it (R. 183; B. A. 408). Petitioner reserved the right to cancel the entire agreement on 10 days' notice (R. 182, 191; B. A. 411) and the proposal emphasized that it merely embodied petitioner's "present policy" (R. 182; B. A. 407–411), thereby, as the Board found (R.

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191–192), attempting to convince the employees that their Union membership was futile. The counterproposal forbade solicitation of members on company property (R. 183; B. A. 408), although petitioner owns all private property in Stonewall (R. 164, 183, 191; B. A. 338–342, 333–336). The counterproposal omitted all reference to a grievance procedure, arbitration, vacations, and other matters which the Union proposals had covered (R. 183, 191; B. A. 408–411). Further conferences, including one after the hearing in this case had started, were fruitless, despite further concessions by the Union, because of petitioner's adamant position on most matters (R. 183–186, 192–193; B. A. 186–239, 342–378, 395–398, 403–406, 416–419).

W. A. Taylor was senior in point of service among petitioner's three roving haulers (R. 195; B. A. 256); he had been employed at intervals for five years prior to his lay-off in April 1939 (R. 194; B. A. 41–43). He was the leader in the Union's creation and development; the Union charter was installed in a ceremony held at his home (R. 195; B. A. 45) and he was secretary of the Union and present at all bargaining negotiations with petitioner prior to his lay-off (R. 195; B. A. 46, 48, 51, 57, 61). In December 1939, subsequent to his lay-off, he became president of the Union (B. A. 70). His Union activities aroused petitioner's opposition; petitioner's secretary, Harrington, characterized him in December 1939 as an "agitator" and "troublemaker" (R. 172, 195; B. A. 129–131, 135)

and two supervisors warned an employee in October 1939 that he would be discharged if he associated with Taylor (R. 170, 195; B. A. 389, 390, 46). Taylor's lay-off occurred on April 27, 1939 (R. 195; B. A. 67), one day after the conference at which President Berman for the first time questioned the Union's majority status (*supra*, p. 5). The two junior roving haulers were retained (R. 195; B. A. 253).

The Board rejected petitioner's contention that Taylor was laid off because his work was unsatisfactory; his immediate supervisors had not complained about his work (R. 196–198; B. A. 80, 262, 386, 243, 250–251) and his overseer told him that his work had not been unsatisfactory (R. 196; B. A. 72). He applied for reinstatement in June 1939 and was told that his job was to be given to another (R. 196; B. A. 71–72); when Taylor inquired "what is the matter with me?" his overseer answered "I don't know * * * you [have been] dealt out" R. 196; B. A. 72). Further applications were unsuccessful (R. 196; B. A. 73–75),[5] though other roving haulers were hired subsequent to his lay-off (B. A. 253–256).[6]

[5] There was also testimony that, upon making one such application in July 1939, Taylor was told by petitioner's superintendent, "Taylor, the only thing I can tell you is the reason you are not working is on account of your union actions" (B. A. 75). The Board made no finding concerning this evidence.

[6] The Board also found that in November 1939 petitioner discriminatorily discharged an employee, C. A. Holliman,

The Board upon the entire record concluded (R. 214–216) that petitioner had interfered with, restrained and coerced its employees in violation of Section 8 (1), had refused to bargain collectively with the Union in violation of Section 8 (5) and (1), and had illegally discriminated against Taylor, Holliman, and Logan, in violation of Section 8 (3) and (1). By way of reparation, in addition to the usual cease-and-desist provisions, it directed petitioner to bargain collectively with the Union, to reinstate the three employees with back pay, and to post the usual notices (R. 216–218).

Thereafter petitioner filed a petition to review in the court below (R. 1–12), and the Board answered requesting enforcement (R. 14–20). In its opinion of June 3, 1942 (R. 226–231), the court below enforced the provisions of the order except those relating to the three discharges, which were set aside. On the Board's petition for rehearing (R. 233–252), the court on July 6, 1942 (R. 253–255) reinstated the order as to Taylor but, in our view erroneously, declined to enforce the order as

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and in January 1940 discriminatorily discharged another employee, Hill Logan, because of their union membership and activity (R. 199–207, 207–212). The court below held that these findings were not supported by substantial evidence and set them aside (R. 230–231, 254). Although we do not agree with the holding of the court below on this branch of the case, we do not believe that the issues raised by the holding are of sufficient importance to warrant our seeking further review by this Court.

to Holliman and Logan.[7] A decree was entered accordingly on August 1, 1942 (R. 255–257).

ARGUMENT

The petition should be denied. The Board's finding that petitioner violated Section 8 (1) of the Act is supported by substantial evidence of clearly coercive conduct including, among other things, threats of discharge for joining the Union or associating with its leaders, *supra*, pp. 3–4, and warnings that the plant would be shut down if the employees organized a union, *id.*, or if petitioner were required to sign a union contract, *supra*, p. 4; and by petitioner's refusal to bargain collectively with the Union (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 433) and its discriminatory discharge of Taylor. Since the statements made were clearly coercive on their face, no question is presented under the First Amendment, *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, particularly since the Board's finding of violation of Section 8 (1) rests on petitioner's "whole course of conduct" (*id.* at p. 479; R. 174, 215).

The finding that petitioner refused to bargain collectively in good faith is supported by its failure to submit counterproposals within a reasonable time, as promised, its express refusal to sign an agreement that might be reached, its suggestion

[7] See *supra*, note 6.

that all wages be reduced to the statutory minimum, its unwillingness to contract for any reasonable period of time, its discharge of a Union leader during negotiations (cf. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 437), and its proposals that a large number of the employees within the apropriate unit be excluded from the contract and be required to relinquish their union activity (*supra*, pp. 6–8, 10). *Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526; cf. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 360.

The finding that Taylor was discriminatorily discharged is adequately supported by petitioner's demonstrated hostility to the Union, its knowledge of, and opposition to, Taylor's activity, the timing of his lay-off, the failure to rehire him, and the fact that his lay-off occurred out of the order of seniority for an asserted reason which the Board on adequate evidence found to be specious (*supra*, pp. 8–9). The inference of discrimination is, on these facts, entirely warranted. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 602. The cases cited by petitioner in which the circuit courts of appeals have held Board orders not supported by substantial evidence turned, of course, on their facts and do not show a conflict.

CONCLUSION

The decision below, in so far as it sustained the Board's findings and order, is correct and presents neither a conflict of decisions nor any question of general importance. The petition should therefore be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

RICHARD S. SALANT,
Attorney.

ROBERT B. WATTS,
General Counsel,

ERNEST A. GROSS,
Associate General Counsel,

GERHARD P. VAN ARKEL,
Assistant General Counsel,

MORRIS P. GLUSHIEN,
Attorney,
National Labor Relations Board.

SEPTEMBER 1942.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its

findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) * * * the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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